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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, SECRETARY OF THE INTERIOR,
APPELLANT

v.

MARY IRVING, ET AL.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. 2206, which provides that certain de minimis undivided fractional interests held by individual Indians in trust or restricted allotments shall not descend by intestacy or devise, but instead shall escheat to the tribe, results in a taking of private property without the payment of just compensation, in violation of the Fifth Amendment to the Constitution.

2. Whether the court of appeals erred in holding that Section 207 of the Indian Land Consolidation Act, as amended by Congress in 1984 (Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*), also is unconstitutional, even though the amended version does not apply to any of the interests in allotments covered by appellees' decedents.

PARTIES TO THE PROCEEDING

The appellant is the Secretary of the Interior. The appellees are Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, as guardian for Duane Cross, Miguel Cross, Hope Cross, Anthony Cross, and Faith Cross. The appellees sought to represent a class of all heirs and potential heirs affected by Section 207 of the Indian Land Consolidation Act of 1983.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	3
A. Historical Background	3
B. The statutory scheme	7
C. The proceedings in this case	11
The questions are substantial	14
Conclusion	27
Appendix A	1a
Appendix B	18a
Appendix C	19a
Appendix D	20a
Appendix E	21a
Appendix F	26a
Appendix G	27a
Appendix H	32a
Appendix I	37a

TABLE OF AUTHORITIES

Cases:

Andrus v. *Allard*, 444 U.S. 51	21
Blanset v. *Cardin*, 256 U.S. 319	23
Choate v. *Trapp*, 224 U.S. 665	14, 25
County of Oneida v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985)	15
Delaware Tribal Business Committee v. *Weeks*, 430 U.S. 73	12
Dodge v. *Board of Education*, 302 U.S. 74	24
Goldblatt v. *Hempstead*, 369 U.S. 590	19
Hadacheck v. *Sebastian*, 239 U.S. 394	19
Irving Trust Co. v. *Day*, 314 U.S. 556	16, 17
Jefferson v. *Fink*, 247 U.S. 288	17, 22, 24
Jones v. *Meehan*, 175 U.S. 1	5
Lone Wolf v. *Hitchcock*, 187 U.S. 553	15
Mager v. *Grima*, 49 U.S. (8 How.) 490	16
Magoun v. *Illinois Trust & Savings Bank*, 170 U.S. 283	16, 18
Mattz v. *Arnett*, 412 U.S. 481	4
McCormick v. *Sullivant*, 23 U.S. (10 Wheat.) 192	16
Miller v. *Schoene*, 276 U.S. 272	19

Page

Cases—Continued:
Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 4
National Railroad Passenger Corp. v. *Atchison, T. & S.F.*, No. 83-1492 (Mar. 18, 1985) 24
Northern Cheyenne Tribe v. *Hollowbreast*, 425 U.S. 649 12
Penn Central Transp. Co. v. *New York City*, 438 U.S. 104 ..... 18, 19, 20
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 20
Randall v. *Kreiger*, 90 U.S. (23 Wall.) 137 16
Ruckelshaus v. *Monsanto Co.*, No. 83-196 (June 26, 1984) 22
Simmons v. *Eagle Seelatsee*, 244 F. Supp. 808, aff'd, 384 U.S. 209 17
Solem v. *Bartlett*, No. 82-1253 (Feb. 22, 1984) 4
Tiger v. *Western Investment Co.*, 221 U.S. 286 ..... 15, 22
United States v. *Fox*, 94 U.S. 315 16
United States v. *Jim*, 409 U.S. 80 12
United States v. *Kagama*, 118 U.S. 375 15-16
United States v. *Mitchell*, 445 U.S. 535 4
United States v. *Perkins*, 163 U.S. 625 16
United States v. *Sioux Nation*, 448 U.S. 371 ..... 16, 20
Webb's Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 21
Williams v. *Zbaraz*, 448 U.S. 358 25

Constitution, statutes and regulations:
U.S. Const.:
Amend V 11, 12, 17, 18, 21, 23
Just Compensation Clause 2, 11, 14
Act of Mar. 2, 1889, ch. 405, 25 Stat. 888 *et seq.* 4
§ 8, 25 Stat. 890 4
§ 11, 25 Stat. 891 ..... 4, 5, 13, 23, 24
Act of June 25, 1910, ch. 431, 36 Stat. 855, 25 U.S.C. 372 *et seq.*:
§ 1, 25 U.S.C. 372 5
§ 2, 25 U.S.C. 373 ..... 5, 13
Act of Oct. 30, 1984, Pub. L. No. 98-608, 98 Stat. 3171 *et seq.* 2, 9
§ 1, 98 Stat. 3173 2
General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.* 3

Page

Constitution, statutes and regulations—Continued:
§ 1, 24 Stat. 388 4
§ 5, 24 Stat. 389 (25 U.S.C. 348) 4, 5, 24
Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 98 Stat. 2517-2519 (25 U.S.C. 2201 *et seq.*) 2
§ 203, 25 U.S.C. 2202 8
§ 204, 25 U.S.C. 2203 9
§ 205, 25 U.S.C. 2204 9
§ 206, 25 U.S.C. 2205 9
§ 206 (c), 25 U.S.C. 2205(c) 22
§ 207, 25 U.S.C. 2206 ..... *passim*
§ 207(b), 25 U.S.C. 2206(b) 10, 25
§ 207(c), 25 U.S.C. 2206(c) 10
Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (25 U.S.C. 461 *et seq.*) 4
§ 1, 25 U.S.C. 461 4
§ 2, 25 U.S.C. 462 4
§ 3(a), 25 U.S.C. 463(a) 4
§ 4, 25 U.S.C. 464 13
§ 5, 25 U.S.C. 465 8
25 C.F.R.:
Section 151.7 ..... 8, 21
Section 152.25 ..... 8, 21
Section 152.33 ..... 8, 21

Miscellaneous:
Amendments to the Indian Land Consolidation Act: Hearing on H.J. Res. 158 Before the Senate Select Comm. on Indian Affairs, 98th Cong., 2d Sess. (1983) 10, 22
Black's Law Dictionary (5th ed. 1979) 13
F. Cohen, *Handbook of Federal Indian Law* (1942) ..5, 7, 23
Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 Wash. L. Rev. 709 (1971) 6, 7
H.R. Rep. 97-908, 97th Cong, 2d Sess. (1982) 7, 8, 22
House Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* (Comm. Print 1960) 6
Indian Fractionated Land Problems: Hearings on H.R. 11113 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 89th Cong., 2d Sess. (1966) 6, 7

Page

Miscellaneous—Continued:

L. Meriam, *The Problems of Indian Administration* (1928) 5
S. Rep. 98-632, 98th Cong., 2d Sess. (1984) 6, 7, 10, 22
Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* (Comm. Print 1960) 5
5 G. Thompson, *Commentaries on the Modern Law of Real Property* (J. Grimes ed. 1979) 17
To Amend the Indian Land Consolidation Act of 1983: Hearings on H.J. Res. 158 Before the Senate Select Comm. on Indian Affairs, 98th Cong., 2d Sess. (1984) 7, 10, 22

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 758 F.2d 1260. The opinion of the district court (App., *infra*, 21a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 18a) was entered on March 29, 1985, and the petition for rehearing was denied on June 6, 1985 (App., *infra*, 19a). The notice of appeal to this Court was filed in the United States Court of Appeals for the Eighth Circuit on July 2, 1985 (App., *infra*, 20a). By order dated August 29, 1985, Justice Blackmun extended the time within which to docket the appeal to and including October 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides in pertinent part:

> nor shall private property be taken for public use, without just compensation.

2. a. The whole of the Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, Tit. II, 98 Stat. 2517-2519, 25 U.S.C. 2201 *et seq.*, is reproduced at App., *infra*, 27a-31a, and the amendments to that Act made by Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*, are reproduced at App., *infra*, 32a-36a.

b. Section 207 of the Indian Land Consolidation Act, as originally enacted and as codified at 25 U.S.C. 2206, provides:

> No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descendent [1] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

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[1] So in original. Probably should be "descend".

Section 207 of the Indian Land Consolidation Act, 25 U.S.C. 2206, as amended by the Act of October 30, 1984, Pub. L. No. 98-608, § 1, 98 Stat. 3173, provides:

> (a) No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the decedent's death.

Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

(b) Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

(c) Notwithstanding the provisions of subsection (a), any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a), provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

STATEMENT

This case concerns the constitutionality of Section 207 of the Indian Land Consolidation Act of 1983, 25 U.S.C. 2206, which was enacted to address the numerous problems created by the increasingly fractionated ownership of Indian allotments. Section 207 provides for the escheat to the tribe concerned of certain de minimis undivided interests in allotments upon the death of the owner of such an interest. Before stating the facts of the case, we shall first describe the historical background and explain the original and amended versions of Section 207.

A. Historical Background

1. The allotment policy commenced on a broad scale with the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*, which was followed by a number of statutes

providing for the allotment of land on individual reservations. See *Solem* v. *Bartlett*, No. 82-1253 (Feb. 22, 1984), slip op. 3-5; *Mattz* v. *Arnett*, 412 U.S. 481, 496-497 (1973). The particular statute involved here, the Act of March 2, 1889, ch. 405, 25 Stat. 888 *et seq.*, provided for the division of the Great Reservation of the Sioux Nation into separate reservations and the allotment of land on those reservations to individual Indians.

Under the allotment acts, individual members of the tribe typically received an allotment of 160, 80, or 40 acres, depending upon their marital status and age and the type of land involved, and the remaining reservation land was to be opened for settlement by non-Indians. General Allotment Act, § 1, 24 Stat. 388. This pattern was followed in the Sioux statute. § 8, 25 Stat. 890. In order to protect the allottees against improvident alienation of their land and to preserve for a generation its tax-exempt status, Section 5 of the General Allotment Act and Section 11 of the Sioux allotment statute provided that the allotted parcel was to be held in trust by the United States for a period of 25 years or such further period as the President might prescribe. 24 Stat. 389; 25 Stat. 891. See *United States* v. *Mitchell*, 445 U.S. 535, 540-544 (1980).

The allotment policy ultimately was repudiated by Congress in 1934 in the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* See *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1979); *Mattz* v. *Arnett*, 412 U.S. at 496 n. 18. In the IRA, Congress prohibited any further allotment of reservation lands (§ 1, 25 U.S.C. 461), extended indefinitely the trust or restricted period of existing allotments (§ 2, 25 U.S.C. 462), and provided for the restoration of surplus unalloted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)).

2. The length of the period during which allotments were to be held in trust made it necessary for Congess to provide for the disposition of an allotted parcel upon the death of the original allottee. Thus, Section 5 of the

General Allotment Act and Section 11 of the Sioux allotment statute provided that, if the original allottee should die, the land would continue to be held in trust for "his heirs according to the laws of the State or Territory where such land is located" (24 Stat. 389, 25 U.S.C. 348; 25 Stat. 891). These statutory provisions had the effect, insofar as allotted lands were concerned, of preempting the inherent right of an Indian tribe to regulate the descent and distribution of the property of its members. *Jones* v. *Meehan*, 175 U.S. 1, 28-32 (1899). See F. Cohen, *Handbook of Federal Indian Law* 139 (1942). In Section 1 of the Act of June 25, 1910, ch. 431, 36 Stat. 855, Congress directed the Secretary of the Interior to ascertain the heirs of a person for whom an allotment is held in trust. 25 U.S.C. 372. In Section 2 of the same Act, Congress also authorized any person age 21 or older who has an interest in a trust or restricted allotment or other property held in trust by the United States to dispose of such property by will, in accordance with regulations prescribed by the Secretary of the Interior. 25 U.S.C. 373. As a matter of practice under these statutory provisions, when the original allottee died, each of his heirs or devisees received an undivided fractional interest in the whole allotment. Each such fractional interest in turn was further subdivided upon the death of the heir or devisee who owned it. As a result, after several generations, ownership of individual allotments often became extremely fragmented.

The problems associated with this trend were explored at least as early as 1928, in the Meriam Report [1] and by Felix Cohen in 1942 in his *Handbook on Federal Indian Law* (F. Cohen, *supra,* at 229-230). Comprehensive studies of the problem were conducted again in 1960 by the responsible committees in both the House and Senate.[2]

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[1] L. Meriam, Institute for Government Research, *The Problems of Indian Administration* 40-41. (1928).

[2] Senate Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* (Comm. Print 1960); House

See generally S. Rep. 98-632, 98th Cong., 2d Sess. 3 (1984); Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 Wash. L. Rev. 709, 712-719 (1971) [hereinafter cited as *Too Little Land*]. By 1960, one-half of the approximately 12 million acres of trust or restricted allotments was held by more than one heir, and one-half of that total in turn was held by more than six heirs. There were numerous examples in which 20 or 30 heirs held undivided interests in a single tract, and instances of more than 100 co-owners were not unheard-of. See S. Rep. 98-632, *supra*, at 3; *Too Little Land* 712; *Indian Fractionated Land Problems: Hearings on H.R. 11113 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 89th Cong., 2d Sess. 13-14 (1966) [hereinafter cited as *1966 Hearings*].

In 1984, the Senate Select Committee on Indian Affairs summarized the consequences of this land ownership pattern (S. Rep. 98-632, *supra*, at 3):

> [T]he consequences of this fractionation are (1) a complex mix of title interests to individual tracts of land, (2) limitations on the ability of individual owners to dispose of their interests in the land, (3) devaluation of individual interests because of inability to convey full title without consent of all of the heirs, (4) loss of control of rental of the property to the BIA because [of] the inability to secure agreement among all of the heirs or even to locate heirs, (5) erosion of interests of tribal members in individual tracts to non-Indians or non-member Indians, (6) inability to control the conduct of individual heirs with respect to the property due to inapplicability of laws against trespass or conversion to persons ow[n]ing any undivided interest in property.

In addition, allotments owned by numerous heirs often cannot be put to their most economic use, and some tracts

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Comm. on Interior and Insular Affairs, 86th Cong., 2d Sess., *Indian Heirship Land Survey* (Comm. Print 1960).

are left in a state of quasi-abandonment because of difficulties experienced by the Bureau of Indian Affairs (BIA) in obtaining agreement of the owners to lease the land. H.R. Rep. 97-908, 97th Cong., 2d Sess. 10-11, 13 (1982).

By the same token, from the BIA's perspective, the fractionated ownership creates substantial administrative problems by increasing the number of recordings required to maintain official land records, the number of probate proceedings to be examined in determining current title status, and the amount of work involved in responding to inquiries concering family histories in connection with the ownership of undivided interests. S. Rep. 98-632, *supra*, at 3. The computation of large common fractions for determining the ownership of undivided interests also has become far more complicated. *Ibid.* Indeed, the cost of maintaining such records often far exceeds the income realized from the fractional interest. See F. Cohen, *supra*, at 229; *1966 Hearings 12-16; Too Little Land* 718 n.42; *To Amend the Indian Land Consolidation Act of 1983: Hearings on H.J. Res. 158 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 6-8 (1984) [hereinafter cited as *1984 Hearings*].

B. **The Statutory Scheme**

1. Congress enacted Section 207 of the Indian Land Consolidation Act of 1983 to address the problems discussed above that are created by the increasingly fractioned ownership of allotments in heirship status. As originally enacted, Section 207 provided that an undivided interest in trust or restricted land within a tribe's reservation or subject to its jurisdiction that represents 2% or less of the total acreage of the tract and has earned its owner less than $100 in the preceding year shall not descend by intestacy or devise, but instead shall escheat to the tribe. 25 U.S.C. 2206. The purpose of this provision was to address the extremes of the problem by preventing the

descent (and the resulting further fractionation of ownership) of interests in an allotment that already were "so small as to be financially meaningless" (H.R. Rep. 97-908, *supra*, at 11).

Section 207 does not, however, affect the rights of the owner of such a de minimis interest, during his lifetime, to receive his share of the income from the property or to exercise any other incidents of ownership, such as the right to use the land in a manner consistent with the rights of other owners of undivided interests in the tract. The Secretary's instructions concerning the implementation of Section 207 (see App., *infra*, 37a-40a) also make clear that the owner of an interest that would be subject to escheat upon his death may avoid that consequence by purchasing sufficient additional interests in the allotment from other co-owners so that his ownership share in the overall tract will exceed the 2% level. See 25 C.F.R. 151.7. Similarly, the owner of a de minimis interest subject to escheat may convey that interest to co-owners or to his relatives pursuant to 25 C.F.R. 152.25, while reserving a life estate for himself. This would enable the owner to retain the benefits of the tract during his lifetime and to ensure that it will remain in individual ownership thereafter.[3] A further option, if feasible, would be for the owner to apply for partition of the tract in such a way as to increase his ownership share. See 25 C.F.R. 152.33. See App., *infra*, 39a-40a.

Moreover, Section 207 cannot be viewed in isolation. It is an integral part of a broader law that responds to a number of land ownership problems on Indian reservations. For example, Section 203 of the Act, 25 U.S.C. 2202, extends to non-IRA tribes the provisions of Section 5 of the IRA, 25 U.S.C. 465, which authorize the Secre-

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[3] Of course, if the transferee's total interests in the tract did not satisfy the 2% or $100 test upon *his* death, the transferee's interest would escheat to the tribe pursuant to 25 U.S.C. 2206, unless he took similar measures to avoid escheat.

tary to acquire interests in land through purchase, relinquishment, gift, exchange, or assignment for the purpose of providing land for Indians. Section 203 therefore enables the Secretary to consolidate tribal or individual landholdings. The Act also contains three sections that grant new powers to tribes, subject to Secretarial oversight, to address land ownership problems. Under Section 204, 25 U.S.C. 2203, a tribe is authorized to adopt a land consolidation program for the elimination of the checkerboard pattern of tribal lands and tribal ownership of fractional interests in reservation lands, and the Secretary thereafter must approve any land transactions that are consistent with that plan. Section 205, 25 U.S.C. 2204, authorizes a tribe to purchase (at fair market value and subject to certain exceptions) all of the interests in a tract of reservation land with the consent of the owners of more than 50% of the total interests in that tract. Finally, in order to stem the passage of previously allotted land into non-Indian ownership, Section 206 of the Act permits a tribe, with the approval of the Secretary, to adopt an ordinance providing that non-members of the tribe or non-Indians shall not be permitted to receive an interest in trust or restricted lands by devise or descent, subject to special protections for non-member or non-Indian spouses or children.[4]

2. In October 1984, Congress amended Section 207 as part of amendments intended to refine the operation of the Indian Land Consolidation Act in a number of respects. Pub. L. No. 95-608, 98 Stat. 3171 *et seq.*; App., *infra,* 32a-36a. The amendments to Section 207 provide still further alternatives to its escheat provisions.

First, Congress relaxed the provision for automatic escheat that had been based on the income derived only in the year prior to the owner's death. The amended version

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[4] The descriptions of Sections 204, 205 and 206 in the text reflect the 1984 amendments to those Sections made by Pub. L. No. 98-608, 98 Stat. 3171 *et seq.*, discussed *infra*..

of Section 207 instead provides that (i) an interest in an allotment will escheat to the tribe if it represents 2% or less of the total acreage and is incapable of earning $100 in any one of the five years *after* the decedent's death , and (ii) the failure of the interest to earn the decedent at least $100 in any one of the five years prior to his death gives rise to a rebuttable presumption that it is incapable of earning $100 in any one of the five years after his death. These changes were intended to account for the possibility that the income in the year immediately prior to the owner's death might have been abnormally low or that the receipt of little or no income did not accurately reflect the true value of the interest because the parcel contained valuable mineral or timber resources that were not exploited during the period in which income was measured. S. Rep. 98-632, *supra*, at 7, 12; *1984 Hearings* 8, 17, 20, 26, 32, 33, 74-78; *Amendments to the Indian Land Consolidation Act: Hearing on H.J. Res. 158 Before the Senate Select Comm. on Indian Affairs*, 98th Cong., 2d Sess. 8, 29, 31, 37 (1983) [hereinafter cited as *1983 Hearings*].

Second, a new Subsection (b) provides that Section 207 does not prohibit the owner of an otherwise escheatable interest from devising that interest to any other owner of a fractional interest in the same tract. This exception serves the statutory goal of consolidation of fractional interests while at the same time permitting the owner of such an interest to ensure that it will remain in individual rather than tribal ownership. S. Rep. 98-632, *supra*, at 12. Third, a new Subsection (c) permits a tribe, with the approval of the Secretary, to adopt its own code to govern the disposition of interests that otherwise would be subject to escheat under Section 207, as long as the tribal code likewise accomplishes the purpose of preventing further descent or fractionation of escheatable interests. Such a tribal code might provide, for example, for an otherwise escheatable interest to descend by intestacy to another owner of a fractional interest in the same tract.

c. **The Proceedings In This Case**

1. a Appellees filed this suit on October 20, 1983, in the United States District Court for the District of South Dakota challenging the constitutionality of Section 207 of the Indian Land Consolidation Act on the ground that it resulted in a taking of property without just compensation, in violation of the Fifth Amendment to the United States Constitution. The named plaintiffs, appellees herein, are Mary Irving, Patrick Pumpkin Seed, and Elaine Bissonette, as guardian for five minor children of Geraldine Poor Bear Cross. The named plaintiffs alleged that they are the potential heirs or devisees of parents (or, in one instance, an uncle) who died possessed of interests in tracts on the Pine Ridge or Rosebud Reservation that were subject to escheat under Section 207. They also sought to represent a class of all heirs and potential heirs of persons who died possessed of lands subject to escheat pursuant to Section 207.

The district court held that Section 207 of the Act does not violate the Just Compensation Clause of the Fifth Amendment, and it accordingly denied appellees' motion for injunctive relief and denied as moot their motion for class certification (App., *infra,* 21a-26a). The district court explained that rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation; that nothing in the Constitution prohibits a legislature from limiting, conditioning, or even abolishing the power of testamentary disposition; and that an expectation of succession to the property of a living person, whether by intestacy or devise, does not vest until the death of that person (App., *infra,* 22a-23a). Thus, the district court concluded that until the time of the death of their parents or uncle, appellees had only a mere expectancy of heirship, which was subject to being altered by Congress at any time, and they therefore had no vested property rights. For this reason, in the court's view, Section 207 did not result in a taking of appellees' property in violation

of the Fifth Amendment. App., *infra,* 23a-25a. The district court also held that under the applicable standard of review enunciated by this Court in *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S. 73, 85 (1977), Congress's treatment of the decedent Indians' undivided fractional interests in allotted lands was tied rationally to the fulfillment of Congress's unique obligation toward the Indians. App., *infra,* 24a-25a n.1.

2. The court of appeals reversed, holding Section 207 unconstitutional (App., *infra,* 1a-17a).

a. The court of appeals first acknowledged that "Congress may alter and condition rights that have not yet vested in individual Indians" (*id.* at 3a-4a, citing *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649 (1976), and *United States* v. *Jim,* 409 U.S. 80 (1972)) and that "the right to receive property by inheritance or devise does not attain the dignity of a property right entitled to the protection of the fifth amendment taking clause" (App., *infra,* 4a (footnote omitted)). The court therefore recognized that appellees could not claim that the mere interference with an expectancy of heirship resulted in a taking of any property rights that had become vested in them (*ibid.*).

The court also rejected two theories by which appellees contended that they had acquired such vested rights. First, the court found "disingenuous and excessively technical" (App., *infra,* 5a) appellees' contention that Congress's use of the word "escheat" indicated an intent not to affect property rights that they allegedly received instantaneously upon the death of the decedent (*id.* at 5a-7a). In the court of appeals' view, the "sensible reading of [Section 207] is that the 1966 Congress, exercising its power as sovereign to control disposition of property at death, declared a limited class of property rights incapable of so passing" (*id.* at 5a (footnote omitted)). In these circumstances, the court reasoned, Congress's use of the term "escheat" is consistent with its established definition of " '[a] reversion of property to the state in consequence of

a want of any individual *competent to inherit*' " (*id.* at 6a, quoting *Black's Law Dictionary* 488 (5th ed. 1979) (emphasis supplied by the court)).

The court of appeals likewise rejected the notion that appellees gained some sort of vested interest through the language of the trust patents pursuant to which the United States originally allotted lands to individual Indians (App., *infra*, 7a-11a). Appellees relied on language of the Sioux allotment statute providing that the land would be held in trust for the allottee or, in the case of his decease, for "his heirs according to the law of the State or Territory where such land is located" (*id.* at 8a, quoting Act of Mar. 2, 1889, § 11, 25 Stat. 891). In the court's view, this language meant only that the trust status was to continue beyond the death of the original allottee, and it was not intended to grant a vested future interest in the heirs and subsequent generations of descendants of the original allottee (App., *infra*, 8a-9a). The court observed that to find such a vested future interest in the heirs of the original allottee and in their heirs would be inconsistent with the provision in the Sioux statute that state law (which is subject to change) was to govern the descent of an allotment by intestacy and with Congress's later recognition of a right in the owner of a trust or restricted allotment to devise his property to others (*id.* at 9a-10a, citing 25 U.S.C. 373, 464). Further, the court explained that creation of such a right would be inconsistent with the purpose of the allotment acts to convert Indian lands to the American system of individualized rather than tribal ownership (App., *infra*, 10a-11a).

b. Although the court of appeals held that Section 207 does not interfere with any vested rights of the *appellees*, the court nevertheless held that it does interfere with what the court of appeals found to be a vested right in the original *allottee* and his successors to pass the lands upon death (App., *infra*, 15a-17a). The court so held even though it acknowledged that appellees had not directly

rested their argument on any distinct right of their decedents. See *id.* at 12a-13a n.11. In the court of appeals' view, the Sioux allotment statute was in the nature of a bargain, under which the allottees received, inter alia, the right to control the disposition of their property in return for relinquishing their claims to tribal lands (*id.* at 16a). On this premise, the court held that governmental interference with that right would result in a taking of property, just as the Court held in *Choate* v. *Trapp*, 224 U.S. 665 (1912), that Congress's repeal of the tax exemption for an allotment during the initial trust period resulted in a taking (App., *infra*, 15a-16a). Because Section 207 does not provide for the payment of compensation to the estates of the decedents whose lands are subject to escheat, the court of appeals held that Section 207 violates the Just Compensation Clause of the Fifth Amendment. In addition, although none of the named appellees was affected by the amended version of Section 207, because the property in question escheated prior to the October 1984 amendments, the court of appeals, without further analysis, held that the amended version of Section 207 is unconstitutional as well (App., *infra*, 17a).

THE QUESTIONS ARE SUBSTANTIAL

The court of appeals has held unconstitutional a provision of an Act of Congress that is intended to stem the ever-increasing fractionation of ownership that has inhibited the use and development of allotted lands and rendered the administration of Indian land and estates both complex and unduly expensive. The provision in Section 207 of the Indian Land Consolidation Act for the escheat to the tribe of certain de minimis interests in Indian allotments upon the death of the owner constitutes a reasonable exercise by Congress of the inherent sovereign power to regulate the descent and distribution of property and to specify the disposition of property for which there

are no heirs who qualify to receive it. This regulatory measure clearly furthers the United States' obligation to the Indians by providing for the gradual elimination of the most extreme aspects of the fractionated ownership problem, while at the same time retaining the interests affected in Indian ownership under the auspices of the tribe concerned. By the same token, Section 207 does not substantially interfere with private property rights. As the court of appeals recognized, the potential heirs of a person who owns a fractional undivided interest have no vested right to receive that interest, and Section 207 likewise does not interfere with the rights of the owner to retain such a fractional interest during his lifetime or to dispose of it to relatives or other owners of interests in the same tract.

The decision below also is of substantial practical importance. In excess of 4,000 interests escheated to the tribe concerned during the period of less than two years that the original version of Section 207 was in effect. Moreover, although the amended version of Section 207 did not apply to any of the interests held by appellees' decedents, the court of appeals invalidated the amended version as well. The result has been to prevent the distribution of property in affected estates of deceased Indians in the Eighth Circuit and to cast a cloud over the administration of such estates and interests of other Indians. Review by this Court is plainly warranted.

1. The court of appeals recognized but then disregarded the firmly established legal principles that govern this case. Congress has plenary authority over Indian affairs and property—particularly property held in trust by the United States or subject to restraints against alienation that long have characterized Indian tenure. See, *e.g.*, *County of Oneida* v. *Oneida Indian Nation*, No. 83-1065 (Mar. 4, 1985); *Tiger* v. *Western Investment Co.*, 221 U.S. 286, 310-317 (1911); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-568 (1903); *United States* v. *Kagama*, 118 U.S.

375, 379-385 (1886). See also *United States* v. *Sioux Nation*, 448 U.S. 371, 408, 414-415 (1980). Accordingly, the congressional authority to regulate the disposition of interests in property upon the death of the Indian owner encompasses whatever sovereign powers a State has over such matters, plus the unique prerogatives of Congress attributable to the special relationship of the United States to the Indians.

Section 207 of the Indian Land Consolidation Act is a valid exercise of Congress's plenary power in this regard. It is "nothing more than an exercise of the power, which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 493 (1850). This Court long has recognized this sovereign power and the corresponding principle that the right to dispose of and acquire property upon the death of the owner is dependent upon governing law. See, *e.g.*, *Irving Trust Co.* v. *Day*, 314 U.S. 556, 562 (1942); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 288-291 (1898); *United States* v. *Perkins*, 163 U.S. 625, 628 (1896); *United States* v. *Fox*, 94 U.S. 315, 320-321 (1876); *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) 137, 148 (1874); *McCormick* v. *Sullivant*, 23 U.S. (10 Wheat.), 192, 202 (1825). Thus, the Court has stressed that a statute permitting a person to dispose of property by will is an enabling act, and that a person may not devise his property in the absence of such authorization. See, *e.g.*, *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. at 289; *United States* v. *Perkins*, 163 U.S. at 627; *United States* v. *Fox*, 94 U.S. at 320.

Similarly, where the sovereign has provided for the descent of property to heirs designated by law, the potential heirs have no vested rights, prior to the death of the owner, to receive the property. As a result, the law govern-

ing intestate succession may be revised by the legislature, and the revised laws may be applied to particular property without contravening the Fifth Amendment, so long as it has not become vested in the heirs under prior law by virtue of the death of the owner. See generally 5 G. Thompson, *Commentaries on the Modern Law of Real Property* § 2405, at 199, 201, § 2406, at 208-209, 211 (J. Grimes ed. 1979).

These principles were summarized by the Court in *Irying Trust Co.* v. *Day,* 314 U.S. at 562 (citations omitted):

> Rights of succession to the property of a deceased, whether by will or intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. Expectations or hopes of succession, whether testate or intestate, to the property of a living person, do not vest until the death of that person.

The Court has applied the same rules to descent and distribution of Indian property, recognizing the power of Congress to amend the governing law as to an interest in an allotment that has not already passed to the heirs of the owner. See *Jefferson* v. *Fink,* 247 U.S. 288, 294 (1918). See also *Simmons* v. *Eagle Seelatsee,* 244 F. Supp. 808, 814 n.11 (E.D. Wash. 1965), aff'd, 384 U.S. 209 (1966). And, indeed, Congress on numerous occasions has amended the laws governing the disposition of the property of an Indian upon his death or subjected the distribution of such property to the operation of state or tribal law that is itself subject to change. See, *e.g.*, 25 U.S.C. 372, 464, 2205; *Jefferson* v. *Fink, supra; Simmons* v. *Eagle Seelatsee, supra.*

b. There is no need here to consider the limits of the foregoing principles or their application to a statute that declares the state or federal government to be the heir to

everyone as to all property within its juridiction. Compare *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. at 288-289. Section 207 of the Indian Land Consolidation Act is a carefully tailored measure that falls well within whatever limits the Fifth Amendment might be thought to impose on such a regulatory statute to ensure that it is not an unconstitutional taking of private property. See *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 123-126 (1978). A number of factors support this conclusion.

First, Congress has not imposed a blanket prohibition against the passing of *all* interests in trust or restricted allotments by intestacy or devise. Section 207 applies only to what Congress reasonably determined to be de minimis undivided fractional interests in such allotments: those that represent less than 2% of the tract and that earned the owner less than $100 in the preceding year (or, under the amended version, are incapable of earning $100 annually). More substantial interests may continue to pass to devisees by will or to heirs in accordance with state law, just as they did before. Thus, as a general matter, Section 207 imposes only a marginal limitation on the ability of Indians to dispose of or receive interests in allotments.

Second, Section 207 serves significant public purposes by addressing the problems associated with the increasingly fractionated ownership of Indian allotments. As we have explained above, that pattern of land ownership has greatly complicated the leasing or other use of such tracts, often preventing their most economic use; devalued the undivided interests because of the practical difficulties associated with use or sale of the land; greatly attenuated the relationship of the numerous individual owners to the land itself; and created substantial and costly administrative difficulties for the BIA in administering the land and the estates of deceased Indians. Section 207 is

directed to the category of cases in which Congress determined that these problems are present in their most extreme form because of the presence of the most fractionated ownership.

Third, and in a related vein, the impact on the ability of an Indian or his heirs or devisees to pass or receive an interest in the allotment is not the incidental and unfair consequence of a regulatory measure directed to other purposes. The fractionated ownership is itself the cause of the problem that Congress sought to remedy, because the existence of a de minimis ownership interest has adverse effects on other owners of the property and on the reservation community as a whole. A legislature has particular authority to address and eliminate such adverse consequences to other property owners. *Penn Central,* 438 U.S. at 125-127. See, *e.g., Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962); *Miller* v. *Schoene,* 276 U.S. 272 (1928); *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915).

Fourth, Congress did not provide that the de minimis interests involved would escheat to the United States; they instead pass to the Indian tribe on whose reservation the allotment is situated or to whose jurisdiction it is subject. This factor is significant for several reasons. In most cases, the tribe itself was the owner of the land prior to the allotment, and Section 207 has the effect in those circumstances of returning property to the original owner. When Congress formally abandoned the allotment policy in 1934, it sought to return the tribes and their reservations to their prior status to the degree possible by restoring surplus land to tribal ownership, providing for the consolidation of tribal lands, barring further allotments, and retaining existing allotments in trust or restricted status. See page 4, *supra.* Section 207 therefore is consistent with and furthers the policies of the IRA that have governed Indian land ownership on reservations for more than 50 years. Moreover, the fact that the interest does not pass to the United States serves to distinguish Section 207

from statutes that constitute a direct invasion of the property by the enacting government. This feature thus reinforces the role of Section 207 as a regulatory measure intended to adjust benefits and burdens in order to promote the common good of those in the community of the Indian reservation generally. See *Penn Central,* 438 U.S. at 124. The retention of the land in Indian ownership also serves to ensure that the measure is in furtherance of the United States' special relationship to the Indians, and not an act of expropriation by the government directed to other ends. Compare *United States* v. *Sioux Nation,* 448 U.S. at 414-417.

Fifth, the Indian tribe to which the property passes has a special responsibility for its members and their families and for the land within its jurisdiction, and the members in turn have a special bond among themselves through the tribe and collectively own a beneficial interest in tribal property, including property that escheats pursuant to 25 U.S.C. 2206. The escheat to the tribe of a de minimis interest in an allotment owned by a tribal member therefore does not entirely sever the nexus of that member or his potential heirs to the property. It also is significant that Section 207 applies uniformly to all undivided interests that represent less than 2% of the total acreage and do not satisfy the $100 income test. Although the escheat of any particular parcel might adversely affect the deceased owner of that parcel or his potential heirs or devisees, those potential heirs and devisees, if they retain a nexus to the tribe or the reservation, presumably stand to benefit in some measure by the escheat of other interests to the tribe. As a result there is some "reciprocity of advantage" that undermines any taking argument in this setting. See *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1922); *Penn Central,* 438 U.S. at 139-140 (Rehnquist, J., dissenting).

Sixth, from the perspective of the owner of a fractional interest in a trust or restricted allotment, it is significant that Section 207 affects only one of the incidents of owner-

ship: the ability to dispose of the property at death. "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus* v. *Allard,* 444 U.S. 51, 65-66 (1979). In *Allard,* the owner was barred from selling the particular property but could retain, donate, or devise it. The Court held that the restriction on this one means of disposing of the property did not constitute a taking. *Id.* at 66-68. In this case, under the original version of Section 207, the owner of a de minimus fractional interest in an allotment likewise retained his full right to all the incidents of ownership and was deprived of only one means of disposing of it—by intestacy or devise upon his death. The owner still could dispose of the interest during his lifetime by selling it to other owners of an interest in the same parcel, by exchanging it for another interest of equal value, or by donating it to a relative. 25 C.F.R. 152.25. Similarly, he could acquire an additonal interest in the tract in order to avoid escheat. 25 C.F.R. 151.7. And, in appropriate circumstances, he could apply for partition of the parcel in kind. 25 C.F.R. 152.33. Moreover, under the amended version of Section 207, an owner may dispose of an otherwise escheatable interest even by devise, provided that the devise is made to another owner of an interest in the same property. Accordingly here, as in *Andrus* v. *Allard, supra,* the statute does not significantly interfere with the incidents of ownership viewed in the aggregate.

Finally, Section 207 does not undermine distinct investment-backed expectations. See *Penn Central,* 438 U.S. at 124. As explained above, a potential heir or devisee has no legally protected vested right in the property, and his bare expectancy of receiving the property is not protected by the Fifth Amendment. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155, 161 (1980). Nor is it likely that the deceased owner of the fractional interest would have made an investment in the property in

anticipation of passing that interest. In most cases, the interest presumably passed to him by intestacy or devise, and in light of its insubstantial nature, his only association with it probably would have been the receipt of a share of its income. Moreover, even during the owner's lifetime, the interest was held subject to restraints that required the consent of the federal government for any alienation. Congress retained the right to alter these restrictions during the trust period in furtherance of its plenary control over Indian property (see, *e.g.*, *Tiger* v. *Western Investment Co.*, 221 U.S. at 316), or to alter the rules governing the distribution of the property at death (*Jefferson* v. *Fink*, 247 U.S. at 294)—circumstances that further diminished any expectation of an unqualified right to dispose of even de minimis interests at death.

The foregoing factors sufficiently demonstrate that Section 207 constitutes a reasonable exercise by Congress of the established sovereign power to establish reasonable rules for the distribution of property upon the death of the owner and does not, in the present circumstances, constitute a taking of property requiring the payment of compensation.[5]

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[5] We agree with the court of appeals (App., *infra*, 17a) that compensation is not available from the United States for any taking that might have occurred. Section 207 itself does not provide for such compensation, and the legislative history is replete with references to the absence of compensation and the intention that the Act would not result in any cost to the United States. H.R. Rep. 97-908, *supra*, at 11; S. Rep. 98-632, *supra*, at 8; *1984 Hearings* 19, 20, 23, 30-31, 33, 34, 35, 37, 38, 39, 40, 42, 46, 57, 76; *1983 Hearings* 21, 38. Compare 25 U.S.C. 2205 (3). Moreover, the legislative history of the 1984 amendments reflects an awareness of the district court's holding in this case that Section 207 did not effect a taking of vested property rights. S. Rep. 98-632, *supra*, at 5; *1984 Hearings* 26, 76. Against this background, we do not believe that Congress intended that compensation nevertheless should be available in a suit against the United States under the Tucker Act. Compare *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 28-30.

c. The court of appeals did not disagree as a general matter with the governing principles, discussed above. In fact, it expressly concurred in the view that potential heirs or devises such as appellees have no vested interest in the receipt of property of a living person that is protected by the Fifth Amendment against intervening changes in the law (App., *infra,* 4a). The court of appeals also correctly held that appellees acquired no such vested rights under the Sioux allotment statute (*id.* at 11a). Instead, although the court appeared to recognize that appellee did not so argue (*id.* at 12a-13a n.11), the court held that "the *decedents* in this case had vested rights in being able to control the disposition of their property at death" (*id.* at 15a (emphasis added)), and that the effect of Section 207 on that right violated the Fifth Amendment (App., *infra,* 16a-17a). The court believed that the provision in the Sioux allotment statute for state law to govern inheritance reflected a bargain under which the individual Sioux obtained a right to dispose of the property at death in return for giving up their interests in tribal lands. This analysis is seriously flawed.

As an initial matter, the court of appeals' notion that the original Sioux allottees or their descendants obtained a vested right to control the distribution of their interests in the allotment at death is refuted by the text of the Sioux statute itself. Section 11 of that act provides that the land will be held in trust for the allottee or, upon his death, for "his heirs according to the laws of the State or Territory where such land is located." The term "heirs" as used in this Section plainly refers to the allottee's heirs under the state law of intestate succession. See F Cohen, *supra,* at 230-231. It was not until the Act of June 25, 1910 that an Indian could dispose of his interest in a trust allotment by will. See *id.* at 231-232; *Blanset* v. *Cardin,* 256 U.S. 319, 323-327 (1921).

In any event, the court of appeals was clearly wrong in construing the Sioux allotment statute as a form of contract in which Congress conferred on individual allottees

and every succeeding generation of their descendants a permanent and vested right to be exempt from whatever amendments the legislature might adopt to govern the distribution of a decedent's property. This Court has recently reaffirmed the established principle that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declare a policy to be pursued until the legislature shall ordain otherwise.' " *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 14, quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937). Nothing in Section 11 of the Sioux allotment statute suggests, much less clearly indicates, that Congress conferred on Indian allottees and succeeding generations of their descendants such a vested right. To the contrary, Section 11 provides that the allotment would descend in conformity with state law, which was itself subject to change, as the court of appeals acknowledged (App., *infra*, 9a n.9).

Moreover, in *Jefferson* v. *Fink*, *supra*, this Court applied the principle that statutes do not create vested rights in the very context of the inheritance of Indian allotments. There, the Court rejected the argument that Congress's specification in a particular allotment statute that descent of allotments would be governed by Arkansas law did not create a vested or contractual right to have that law applied, and that Congress could later provide for another disposition of the property of a deceased allottee. 247 U.S. at 293-294. The Court relied in part on the language in Section 5 of the General Allotment Act providing for the allotment to continue to be held in trust for the original allottee's heirs according to state law (247 U.S. at 290). Because the relevant language in Section 11 of the Sioux allotment statute is identical to that in Section 5 of the

General Allotment Act, there likewise is no reason to believe that Congress intended to confer on the Sioux allottees a vested right to be exempt from future statutory changes affecting the distribution of property.

Finally, even if some right to pass an allotment at death was originally contemplated, that right cannot be thought to have been of permanent effect (compare *Choate* v. *Trapp*, 224 U.S. 665 (1912)) and to vest absolutely in each succeeding generation of the allottee's descendants, irrespective of intervening events and the pressing circumstances occasioned by the extreme fragmentation of ownership. It is far more likely that Congress would have intended an interest in an allotment to be subject to the reserved sovereign power to adopt reasonable rules, such as those in Section 207, to govern the descent and distribution of property.

2. The court of appeals invalidated not only the original version of Section 207, but also the amended version that became effective on October 30, 1984. App., *infra*, 17a. The court did so even though all of the interests of the decedents in this case escheated pursuant to the original version of Section 207 (see App., *infra*, 3a). And the court also did so without discussing any features of the latter provision—such as the new Subsection (b), which permits the owner of an otherwise escheatable interest to devise it to another owner of an interest in the same tract—that even more clearly establish that Section 207 does not impermissibly interfere with a supposed right to dispose of property at death.

Because there was no case or controversy regarding the application of the amended Section 207 to the parties before the court of appeals, that court had no authority to invalidate that provision as well. *Williams* v. *Zbaraz*, 448 U.S. 358, 367 (1980). Accordingly, if this Court ultimately should affirm the judgment below insofar as it invalidates

the original version of Section 207, the Court should vacate that judgment insofar as it invalidates the amended version of Section 207.

3. The questions presented are of substantial practical importance. We have been informed by the Department of the Interior that approximately 4,430 property interests escheated to the tribes concerned during the period that the original version of Section 207 was in effect. Moreover, in light of the decision of the court of appeals, the Department of the Interior has found it necessary to order that no final distribution be made of property in affected probate proceedings in the Eighth Circuit pending this Court's decision, and a cloud has been cast over probate proceedings elsewhere as well.[6] In addition, if the judgment of the court of appeals is permitted to stand, the result will be a return to the increasingly fractionated ownership of Indian allotments that gave rise to the passage of Section 207. Review by this Court therefore is clearly warranted.

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[6] A similar suit challenging Section 207 has been filed by enrolled members of the Nez Perce Tribe. *Marsh* v. *Hodel*, No. 85-3099 (D. Idaho.)

CONCLUSION

Probable jurisdiction should be noted.
Respectfully submitted.

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OCTOBER 1985

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-1094

MARY IRVING, PATRICK PUMPKIN SEED, EILEEN BISSONETTE AS GUARDIAN FOR DUANE CROSS, MIGUEL CROSS, HOPE CROSS, ANTHONY CROSS, FAITH CROSS, AND ALL OTHERS SIMILARLY SITUATED, APPELLANTS

v.

WILLIAM P. CLARK, SECRETARY, DEPARTMENT OF INTERIOR AND HIS AGENTS, ASSIGNS, AND SUCCESSORS IN OFFICE, APPELLEES

Appeal from the United States District Court for the District of South Dakota

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Submitted: October 8, 1984
Filed: March 29, 1985

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The issue before us is the constitutionality of 25 U.S.C. § 2206 (1982),[1] which provides that de minimis shares of

[1] This statute has been amended since oral arguments were heard in this case, Act of Oct. 30, 1984, Pub. L. No. 98-609 (H.R.J. Res. 158), 98 Stat. 3171, 3173, but its operation as challenged here is unaffected and the parties have not suggested that any of the changes put the plaintiffs outside the provision's coverage.

land allotted in trust to individual members of the Oglala Sioux Tribe may not pass by intestacy or devise but instead escheat to that tribe. The designated heirs and devisees of three deceased tribe members argue that this statute deprives them of property without just compensation in violation of the fifth amendment. The district court found the provision constitutional. We reverse.

The lands at issue in this case were allotted to individual members of the Oglala Sioux Tribe, to be held in trust for those individuals by the United States, pursuant to congressional Indian land policies of the late 1800's and early 1900's. Act of Mar. 2, 1889, ch. 405, 25 Stat. 888.[2] These and subsequent policies, however, resulted in the lands frequently being jointly owned by such large numbers of individuals with undivided fractional interests that the tracts could not be made productive. In an attempt to alleviate this problem, Congress in 1983 enacted the Indian Land Consolidation Act, Pub. L. No. 97-459, tit. II, 96 Stat. 2515, 2517 (1983), 25 U.S.C. §§ 2201-2210 (1982) (amended by Act of Oct. 30, 1984, Pub. L. No. 98-608, 98 Stat. 3171). *See* H.R. Rep. No. 908, 97th Cong., 2d Sess. 13, *reprinted in* 1982 U.S. Code Cong. & Ad. News 4415, 4422-23; S. Rep. No. 632, 98th Cong., 2d Sess. 2-3, 10-11 (1984); *see generally Too Little Land, Too Many Heirs—The Indian Heirship Land Problem,* 46 Wash. L. Rev. 709 (1971). This Act includes a provision aimed at reducing further multiplication of ownership upon the death of current interest-holders:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent [sic] by intestacy or devise but shall escheat to that

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[2] This Act applied to the former Great Sioux Reservation the land distribution system authorized by the Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 381 (1982)).

> tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

25 U.S.C. § 2206 (as originally enacted).

Mary Irving, Patrick Pumpkin Seed, and Duane, Miguel, Hope, Anthony, and Faith Cross (hereafter "Irving"), members of the Oglala Sioux Tribe, all had parents or uncles as to whom they were potential heirs or named devisees die within six months after the Indian Land Consolidation Act was passed. Upon receiving notice that a hearing had been scheduled for the week of October 24, 1983, to determine if the Oglala Tribe had a right through escheat to any lands of her decedent that might otherwise have passed to her, Irving filed this suit in district court. Her complaint requested preliminary and permanent injunctions against enforcement by the Department of Interior of section 2206 with a declaratory judgment that the provision was unconstitutional as authorizing seizure of her property without the just compensation required by the fifth amendment. The district court restrained the government from proceeding under the escheat provision for a time but then consolidated the preliminary and permanent injunction issues and denied relief, holding that Irving had only an expectancy of heirship, which could be altered by intervening legislation, and not a vested property right, which would have been entitled to constitutional protection.

It is clear that the vested property rights of individual Indians are "secured and enforced to the same extent and in the same way" as the equivalent rights of other citizens. *Choate* v. *Trapp*, 224 U.S. 665, 677 (1912); *see Morrow* v. *United States*, 243 F. 854 (8th Cir. 1917). It is also clear, however, that Congress may alter and condition rights that have not yet vested in individual Indians, *see Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976);

United States v. *Jim*, 409 U.S. 80 (1972) (per curiam), and that the right to receive property by inheritance or devise does not attain the dignity of a property right entitled to the protection of the fifth amendment taking clause.[3] 5 G. Thompson, *Commentaries on the Modern Law of Real Property* § 2405, at 199 (J. Grimes ed. 1979); *id.* § 2406, at 211; *id.* § 2411, at 240; *see also Jefferson* v. *Fink*, 247 U.S. 288, 294 (1918); *Simmons* v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 n.11 (E.D. Wash. 1965), *aff'd per curiam*, 384 U.S. 209 (1966). *Cf.* L. Simes & A. Smith, *The Law of Future Interests* § 1, at 3-4 (2d ed. 1956) (possibility of taking property by inheritance or devise does not constitute "future interest" because the prospective taker is not considered to have any part of the present ownership interest). Irving on appeal thus asserts two theories by which she allegedly acquired fifth amendment rights in the questioned lands in her decedent's estate—first, that her interest vested upon the death of her ancestor while the escheat provision could operate only subsequent to that time; and second, that the language of the initial allotments of Indian land to Oglala tribe members around 1900 created vested interests in potential heirs, including her, under the common law or as a matter of contract.

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[3] Apparently, no case has ever addressed an attempt by a sovereign to completely abolish inheritance and require that certain property escheat at death. Because of the sovereign's power over the order of succession, however, any possibility that total abrogation of inheritance might be impermissible does not alter the conclusion that no particular individual potential heir has a *vested right*, which is the issue with which we are concerned. Claims thus for protection against taking of *property* under the fifth amendment are to be distinguished from substantive due process or equal protection allegations which potential heirs might choose to raise. Also, abrogation of inheritance might more properly be seen as implicating a right of the *deceased* to pass his property. *CF. infra* section III.

I.

Irving's first argument relies on a disingenuous and excessively technical construction of certain words in section 2206, "Escheat," Irving reasons, denotes the operation by which the government acquires the right to an estate left vacant because the possessor has died intestate without heirs. Therefore, when heirs exist, their rights vest instantly at death, before the state can take any interest, and the use of the term "escheat" in section 2206 is a "subterfuge" for the taking without compensation of Irving's already vested property rights.

The statute, however, on its face contemplates the existence of heirs or even devisees, and Congress earlier had already provided that certain Indian lands were to escheat to the tribe, as opposed to the state or federal government, when the possessor died without heirs. 25 U.S.C. § 373a (1982). "Escheat," then, seemingly was not intended to have in section 2206 the limited meaning ascribed to it by Irving. A statute should be construed to make sense, *see Griffin* v. *Oceanic Contractors,* 458 U.S. 564, 575 (1982), and so as to support, rather than defeat, its constitutionality. *Crowell* v. *Benson,* 285 U.S. 22, 46 (1932). The sensible reading of section 2206 is that Congress, exercising its power as sovereign[4] to control disposition of property at death, declared a limited class of property rights incapable of so passing. *See Irving Trust Co.* v. *Day,* 314 U.S. 556, 562 (1942); *Mager* v. *Grima,* 49 U.S. (8 How.) 490 (1850); 5 G. Thompson, *supra,* § 2406, at 212; 5A G. Thompson, *Commentaries on the Modern Law of Real Property* § 2607, at 354 (J. Grimes ed. 1978). Thus, no in-

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[4] The power of Congress over Indians has been characterized as similar to the power Congress exercises over the District of Columbia, territories and possessions, and other federal enclaves. *Felix S. Cohen's Handbook of Federal Indian Law* 219-20 (1982 ed.). Congress's Indian powers thus are comparable to those of state governments in their respective realms.

terest within the purview of the statute could ever have vested in Irving.

This interpretation is supported by a comparison of the language of section 2206 with that of the immediately preceding section of the Indian Land Consolidation Act, 25 U.S.C. § 2205, as originally enacted. Section 2206 commands that no Indian lands within its purview "shall descedent [sic] by intestacy or devise"; section 2205 in contrast provides that, upon appropriate action by a given tribe, nonmembers of that tribe and non-Indians "shall not be entitled *to receive* by devise or descent" (emphasis added) any interest in allotted individual trust land. Congress in the legislative history expressly stated that section 2205 was not intended as a restriction on the testamentary power of Indians and that interests were to pass according to will if the tribe did not exercise its right to acquire the land by paying fair market value. H.R. Rep. 908, 97th Cong., 2d Sess. 9, *reprinted in* 1982 U.S. Code Cong. & Ad. News 4415, 4418; *see also* 25 U.S.C. § 2205(3). Given the differing language and the failure in section 2206 to provide for compensation, it is fair to infer that Congress in that section, in contrast to its intent in section 2205, did presume to limit the power of disposition at death as to certain lands.[5]

Such an interpretation further is not inconsistent with the presence of the term "escheat," which, to use the definition cited by Irving, is "[a] reversion of property to the state in consequence of a want of any individual *competent to inherit.*" *Black's Law Dictionary* 488 (5th ed. 1979) (emphasis added). Irving limits the meaning of "any individual competent to inherit" to "heirs"; but since "heirs" themselves are identified and ordered by the sover-

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[5] For other sections that, like section 2205, give effect to the decedent's intent but then under certain circumstances replace an heir's or devisee's interest in land with monetary compensation, see 25 U.S.C. §§ 272, 273 (1982).

eign, 5 G. Thompson, *supra,* § 2405, at 202, 240,[6] there seems no reason why the sovereign could not use the terminology "escheat" in purporting to make parties incompetent to inherit for reasons other than lack of a sufficient degree of relationship. "Escheat" historically was used to refer to the operation by which a sovereign acquired title to land due to, for example, the possessor's misconduct, as well as upon death without heirs. *Id.* § 2510, at 464-65. The term now may encompass the passing to the sovereign of land that has been abandoned or as to which the owner is missing or which is illegally held by a corporation. *Id.* § 2511, at 474.[7] Thus, the use of "escheat" is actually most consistent not with Irving's interpretation that section 2206 takes land already vested in Indian heirs and devisees but with the interpretation that the government has deemed that no person shall be "competent" to inherit certain de minimis interests in land. Affected de minimis interests thus could never vest in purported heirs and devisees and did not vest in Irving here so that she has no property right protectible under the fifth amendment taking clause.

II.

In the alternative, Irving argues that she gained some sort of vested future interest in the land of her decedent through the language of the trust patents pursuant to which the United States originally allotted lands to individual Indians. The Oglala Sioux patents were to declare

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[6] One commentator has indeed observed a "noticeable trend in the statutes to increase the possibility of the state being an heir by limiting the circle of partiable inheritance." 5 G. Thompson, *supra,* § 2411, at 240.

[7] The language in additional passages in 5 *Thompson* further suggests that "escheat" may lossely, if not technically, be used to refer to any circumstance in which the sovereign takes title to property. *See* 5 G. Thompson, *supra,* § 2510, at 463; *id.* § 2514, at 482.

> that the United States does and will hold the lands thus allotted * * * in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located * * * *Provided further,* That the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto * * *.

Act of Mar. 2, 1889, ch. 405, § 11, 25 Stat. 888, 891.

Initially we point out that, contrary to the manner in which the Irving cited this passage in her brief, the "heirs" language appears only in the context of identifying beneficiaries of the trusts and not in conjunction with grants of interests to individual Indians; the term may function merely to indicate that the trust status of the lands was to continue upon the death of holders of equitable interests.[8] Further, since we have no evidence that Irving's decedent was an original allottee, she cannot claim a vested right by construing the patents as creating life estates in the allottees: the remainders would then vest *fees* in the first generation of heirs and would not pass rights to the allottees' future decedents. Creation of a fee tail generally requires an express reference, absent here, to heirs "of his body" or other words of procreation, 4 G. Thompson, *Commentaries on the Modern Law of Real Property* § 1866, at 483 (J. Grimes ed. 1979), and such an estate also would not create a vested interest in Irving because heirs apparent in tail again have only expectancies. L. Simes & S. Smith, *supra,* § 398. Irving, rather, seems to be relying either on an ancient common law theory that land was actually owned by families rather than individuals such that heirs had property rights which

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[8] For example, regulations provide that a non-Indian to whom allotted lands pass is entitled to a patent in fee rather than in trust. 25 C.F.R. § 152.6 (1983).

could not be defeated by alienation without their consent, *see* 5 G. Thompson, *supra,* § 2406, at 206-08; *id.* § 2410, at 234, or, as clarified in her reply brief, on the maxim that enactments should be construed in favor of and as they would have been understood by the Indians, *Choate* v. *Trapp,* 224 U.S. 665, 675-77 (1912); *Antoine* v. *United States,* 637 F.2d 1177, 1179-80 (8th Cir. 1981), particularly when, as here, the statute is in the nature of a treaty or contract and would not have taken effect absent approval by the tribe. *See* Act of Mar. 2, 1889, ch. 405, § 28, 25 Stat. 888, 899.

All these theories are subject to several objections. First, the existence of any vested right in an allottee's heirs would mean that an Indian to whom the land was allotted would have no power to dispose of that property by will. Subsequent enactments of Congress, however, assume such a power of devise and presume to oversee and condition it. *E.g.,* 25 U.S.C. §§ 373, 464 (1982). Irving does not even seem to recognize the implications of her argument as to these statutes; in fact, certain of her fellow plaintiffs are actually claiming under a will rather than as intestate heirs. *Cf.* L. Simes & A. Smith, *supra,* § 403, at 433 (courts' concern with finding vested rights in potential heirs and devisees springs in part from the intolerable interference with owner control over property that thus would be allowed).

Second, the language of the allotment act pursuant to which the Oglala Sioux took their individual trust patents expressly provides that state law as to intestate succession shall control. Such a reference would be unnecessary if the allotment by its terms had already created vested rights in certain heirs.[9] Finally, we point out that Congress, when it

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[9] We further reject any argument that this clause functioned to vest rights in those individuals who would have been heirs under the law of the applicable state at the time of allotment, thus protecting their expectancies from changes in state as well as federal law. *See Jefferson* v. *Fink,* 247 U.S. 288 (1918).

has so intended, has made clear in its statutes that lands allotted in trust to individual Indians were to pass to those individuals' heirs. *E.g.*, Act of June 30, 1902, ch. 1323, § 16, 32 Stat. 500, 503 ("The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will * * *."); Act of Feb. 6, 1871, ch. 38, § 8, 16 Stat. 404, 407 ("[T]he lands assigned and allotted as aforesaid shall be held inalienable, and in case of the death of any person, his or her right thereto shall descend to his or her heirs * * *."); *cf.* Treaty with the Omahas, Mar. 16, 1854, art. 6, 10 Stat. 1043, 1044 (The President "may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home"); Treaty with the Ottoes & Missourias, Mar. 15, 1854, art. 6, 10 Stat. 1038, 1039 (identical language except "secure" used in place of "insure").

These considerations are equally relevant to the argument that the allotments should be read as the Indians would have understood them. Highly malleable rules of statutory construction must have some limit, and the Supreme Court has also stated that "[l]egislation dealing with Indian affairs 'cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.' " *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (quoting *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)). A conclusion that a trust patent vested rights in an Indian's heirs would be contrary to the recognized purpose of the allotment scheme of converting Indians to the American system of individualized, as opposed to tribal, land ownership, *see Mattz* v. *Arnett*, 412 U.S. 481, 496 (1973); *Felix S. Cohen's Handbook of Federal Indian Law* 128-32 (1982 ed.), a system which of course is character-

ized not by common law concepts of family title but generally by the right of devise. The legislative history cited by plaintiffs, S. Exec. Doc. No. 51, 51st Cong., 1st Sess. (1890), *found in* Serial Set 2682, is not to the contrary. Any emphasis that lands allotted to individual Indians could not be taken from them and their children does not necessarily lead to the conclusion that the parties intended to vest rights in those allottees' heirs; the record is equally consistent with the idea that the lands were to be protected from future interference or diminution *by the government* but that the individual Indians themselves, subject to safeguards against trickery by white settlers, could control whether their lands passed to their heirs.[10]

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[10] Senate Executive Document No. 51 is the report of the Commission sent to the Sioux territories to obtain the approval of the various tribes, as necessary before the allotment statute at issue here could take effect. *See* Act of Mar. 2, 1889, ch. 405, § 28, 25 Stat. 888, 899. Irving quotes from the appendix, exhibit c, which is the diary kept by the Commission during its travels. The following passages are representative of the material in her brief:

> The great trouble with the other treaties was that they did not give the Indians patents for their land, and now this treaty gives you papers for your land, that nobody can take away from you. [Applause.] Your taking a patent for it takes it out of Congress, and they can't make any change in it.

S. Exec. Doc. No. 51, *supra*, at 54 (Gen. Crook at the Rosebud Agency, Dakota, June 7, 1889).

> And if you take your land in severalty a deed is given to you by the Great Father, and he holds it in trust for you for twenty-five years, so that you cannot be traded or cheated out of it, so that it will remain for you and your children and your children's children.

Id. at 73 (Gen. Warner at the Pine Ridge Agency, Dakota, June 15, 1889).

> When you get a deed for your land nobody can take it away from you or your children afterwards. As long as you keep it in common as you do now you are liable to be legislated out of it just as you have been in the past.

III.

This is not to say that the legislative history cited by Irving and the treaty/contract nature of the Sioux allotment act are of no consequence to any consideration of section 2206. As we implied (and footnote 10, *supra,* illustrates), the Indians clearly had a concern with retaining possession of their land in the face of possible future governmental interference, of which the escheat statute here might be an example. Thus, while potential heirs and devisees took no vested rights,,protectible interests within the contemplation of the fifth amendment might still exist in the original allotees themselves and in successors, such as Irving's decedent, to whom land had actually passed prior to the enactment of section 2206. We must first decide, however, if Irving should be granted standing to raise such third-party rights.[11]

Id. at 85 (Gen. Crook at the Pine Ridge Agency, Dakota, June 17, 1889).

The references to heirs and children in conjunction with land actually seem to be relatively sparse given the nearly 200 pages of diary. The dialogue between the Indians and the Commission centered more on whether the government would live up to obligations assumed in this and previous treaties (i.e., Treaty with the Sioux, Apr. 29, 1868, 15 Stat. 635), particularly in regard to providing education to Indian children and supplying agricultural implements and seeds and clothing and food rations. The general emphasis was that conversion to "white man's ways" and system of individual land ownership with the anticipated achievement of Indian self-sufficiency would promote the best life and the best future for the Indians' children, not that the treaty would vest specific rights to Indian lands in heirs in perpetuity: "All I can say now is, when I am laying on my death-bed, if you do not defeat this bill, I will have the satisfaction of knowing that I *can leave* a piece of land to my children * * *." S. Exec. Doc. No. 51, *supra,* at 113 (American Horse at the Pine Ridge Agency, Dakota, June 21, 1889) (emphasis added).

[11] There may be some question as to whether the third-party rights of decedents were raised sufficiently on their merits to justify our attention here. Irving's brief, however, in at least two places appears to

A.

While "[o]rdinarily, one may not claim standing * * * to vindicate the constitutional rights of some third party," *Barrows* v. *Jackson,* 346 U.S. 249, 255 (1953), that requirement is not jurisdictional[12] but is "only a rule of practice" which may be "outweighed by the need to protect the fundamental rights which would be denied." *Id.* at 275. The Supreme Court has suggested two factors to be considered in determining when the third-party rule should be suspended: the relationship of the litigant to the person whose right he seeks to assert, and the ability of the third party to assert his own right. *Singleton* v. *Wulff,* 428 U.S. 106, 114-16 (1976); *see Gold Cross Ambulance & Transfer* v. *City of Kansas City,* 705 F.2d 1005, 1016 (8th Cir. 1983), *petition for cert. filed,* 52 U.S.L.W. 3039 (U.S. July 25, 1983) (No. 83-138).[13]

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be arguing her decedent's rights (p. xii—"The Appellants also urge that the Court clearly limit the power of Appellees, as the sovereign, to extinguish the title to the *decedent's property* * * * the Appellees' argument that [the sovereign's power] includes the right to extinguish *interests of the decedent* * * * points * * * too broadly" (emphasis added); p. 19—"The Court did not hold * * * that the State of New York had or was entitled to extinguish the *decedent's interest in his property* * * * (emphasis added)). In addition, the third-party argument follows from Irving's assertions that the allotment statute was in the nature of a treaty or contract except that this theory looks to rights vested in a different party (the distinction between decedents' and heirs' rights in this context might even seem overly technical to some). We thus feel comfortable in deciding the case on this basis.

[12] Standing to raise third-party rights, or jus tertii, thus is to be distinguished from "injury in fact" standing, which is mandated by the case or controversy requirement of article III of the Constitution and which is jurisdictional. *Singleton* v. *Wulff,* 428 U.S. 106, 112 (1976). Irving clearly has standing in the latter sense; the injury of loss of property (though not of a vested right to property) is sufficiently concrete since the ancestor through whom Irving claims has died intestate and we know Irving would have taken absent the operation of section 2206.

[13] The Supreme Court in *Secretary of State* v. Joseph H. Munson

The second part of this test is obviously met here. Irving's decedent cannot rise from the grave to assert his own rights. The right to pass property by devise or inheritance, however, cannot truly be exercised until death; seemingly the right must contemplate not just, for example, the writing of the will but also the disposition of the property according to the wishes expressed therein. If heirs and devisees do not have standing to assert their decedents' rights during settlement of estates, rights of devise and inheritance becomes mirages shimmering in life but vanishing at death upon attempted use.

The nature of the right to dispose of property at death also has implications for the first factor of the third-party standing test, i.e., the relationship between the litigant and the person whose rights he seeks to asserts. Since the act of passing property has no meaning absent receipt by the selected beneficiary, section 2206 clearly "preclude[s] or otherwise adversely affect[s] a relationship existing between [Irving] and the persons whose rights assertedly are violated." *Warth* v. *Seldin,* 422 U.S. 490, 510 (1975). "[E]njoyment of the right [of passing property at death] is inextricably bound up with the activity [inheriting property] the litigant wishes to pursue." *Singleton,* 428 U.S. at 114. We cannot set where the issues would have been more concretely presented or vigorously contested in a suit brought by Irving's decedent prior to his death. *Id.* at 115; *see also Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. 2839, 2848 (1984). There is no conflict of interest

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Co., 104 S. Ct. 2839, 2847 (1984) states that once injury-in-fact standing (*see supra* note 12) has been established the only concern is whether the third party "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." Because the Court's analysis in that case, however, draws on the presence of first amendment issues and interweaves overbreadth doctrine, we are not certain how the holding applies to our facts and we will apply *Singleton* v. *Wulff, supra,* here anyway, it being the more restrictive.

between Irving and her decedent. *See Gold Cross Ambulance*, 705 F.2d at 1016; *see also Munson Co.*, 104 S. Ct. at 2848.

B.

Section 2206 in requiring that certain de minimis shares of land escheat to the individual Indians' tribes upon death in essence reduces the ownership interests of those allottees from fees to life estates, a diminution which the Supreme Court has suggested in dicta would constitute a taking without compensation in violation of the fifth amendment. *Choate* v. *Trapp*, 224 U.S. 665, 674 (1912). We need not, however, reach that far (or consider the issue of other possible constitutional limits on the power of the sovereign to abrogate inheritance, *see supra* note 3) to find that the decedents in this case had vested rights in being able to control the disposition of their property at death. Our analysis instead begins with an evaluation of the rights created in the allotment statute and patents.

The Supreme Court in *Choate* considered whether Congress could through subsequent legislation remove the tax exemption from lands allotted to individual Choctaw and Chickasaw Indians pursuant to the Atoka Agreement, which was bodily incorporated in the Curtis Act of June 28, 1898, ch. 517, §29, 30 Stat. 495, 505, 507. The Court stated that while a statute could be repealed at the will of Congress, rights acquired thereunder could not be destroyed and held that each allottee had gained a vested right protected by the Constitution because his patent was issued only on the condition that he relinquish all claims to former commonly held Indian tribal property. 224 U.S. at 671-72. Each Indian had "furnished a consideration which was sufficient to entitle [him] to enforce whatever rights were conferred," *id.* at 672; since the Indians were bound by their concessions and could no longer be heard to assert claims to former common tribal lands, the United States

similarly was to be bound by the rights it conveyed in the statute and allotment patents. *Id.* at 674. The tax exemption was a property right incident to the land which had vested in the individual Indian allottees pursuant to the statute and patents. *Id.* at 673-77.

While the tax exemption in *Choate* was expressly limited to the original allottees, our subsequent decisions show that if more expansive vested rights are created, they may devolve to and be enforced by Indian successors to patent lands. *See County of Thurston* v. *Andrus*, 586 F.2d 1212 (8th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979). Nor do we have trouble finding in other regards that the logic of *Choate* applies to the allotment statute at issue here. In *Thurston* we construed the prototype allotment act (*see supra* note 2) as being, as in *Choate*, in the nature of a bargain, 586 F.2d at 1220; and the Sioux allotment act at issue here in fact has a specific clause to the effect that acceptance of benefits thereunder by individual Indians would be taken as a release of those individuals' claims to tribal lands. Act of Mar. 2, 1889, ch. 405, § 16, 25 Stat. 888, 893. Each Indian allottee thus gained vested rights through the Sioux land act; and the statutory language, with its provision that state law should govern inheritance, and the legislative history cited by Irving, with its emphasis on obtaining patents to protect allotments from future governmental interference (*see supra* note 10), make clear that the ability to pass the lands upon death was among the rights contemplated by the parties as vesting in the allottees. Furthermore, disposition of property at death has always been an integral and distinguishing factor as to types of property interests, and the power to control such disposition predominantly characterizes the "white man's ways" which the Indians were to assimilate. The individual Sioux thus had "enforceable expectations" that that power was part of the rights they received in return for relinquishment of their claims to former tribal lands. *See Thurston*, 586 F.2d at 1221.

By its plain terms—and there is no contention to the contrary—section 2206 does not provide for compensation to the estates of decedents for the land it declares to escheat. Accordingly, the statute is in violation of the fifth amendment, and we need not reach the further question of whether the taking was for a public purpose. We reverse the district court, declare section 2206—as written when asserted against Irving and as amended (*see supra* note 1) insofar as the new provision preserves the language of the old—unconstitutional, and remand for entry of appropriate relief.

APPENDIX H

Public Law No. 98-608, 98 Stat. 3171 *et seq.*, which amends the Indian Land Consolidation Act of 1983, provides as follows:

(1) At the end of section 204 change the period to a colon and insert the following: "*Provided,* That –

"(1) the sale price or exchange value received by the tribe for land or interests in land covered by this section shall be no less than within 10 per centum of the fair market value as determined by the Secretary;

"(2) if the tribal land involved in an exchange is of greater or lesser value than the land for which it is being exchanged, the tribe may accept or give cash in such exchange in order to equalize the values of the property exchanged;

"(3) any proceeds from the sale of land or interests in land or proceeds received by the tribe to equalize an exchange made pursuant to this section shall be used exclusively for the purchase of other land or interests in land;

"(4) the Secretary shall maintain a separate trust account for each tribe selling or exchanging land pursuant to this section consisting of the proceeds of the land sales and exchanges and shall release such funds only for the purpose of buying lands under this section; and

"(5) any tribe may retain the mineral rights to such sold or exchanged lands and the Secretary shall assist such tribe in determining the value of such mineral rights and shall take such value into consideration in determining the fair market value of such lands.

"(b) The Secretary must execute such instrument of conveyance needed to effectuate a sale or exchange of tribal lands made pursuant to an approved tribal land consolidation plan unless he makes a specific finding that such sale

or exchange is not in the best interest of the tribe or is not in compliance with the tribal land consolidation plan."

(2) Section 205 is amended to read as follows:

"SEC. 205. Any Indian tribe may purchase at no less than the fair market value part or all of the interests in any tract of trust or restricted land within that tribe's reservation or otherwise subject to that tribe's jurisidiction with the consent of the owners of such interests. The tribe may purchase all of the interests in such tract with the consent of the owners of over 50 per centum of the undivided interests in such tract: *Provided,* That—

"(1) any Indian owning any undivided interest, and in actual use and possession of such tract for at least three years preceding the tribal initiative, may purchase such tract by matching the tribal offer;

"(2) if, at any time within five years following the date of acquisition of such land by an individual pursuant to this section, such property is offered for sale or a petition is filed with the Secretary for removal of the property from trust or restricted status, the tribe shall have 180 days from the date it is notified of such offer or petition to acquire such property by paying to the owner the fair market value as determined by the Secretary;

"(3) all purchases and sales initiated under this section shall be subject to approval by the Secretary.".

(3) Section 206 is amended to read as follows:

"SEC. 206. (a) Notwithstanding any other provision of law, any Indian tribe, subject to approval by the Secretary, may adopt its own code of laws to govern descent and distribution of trust or restricted lands within that tribe's reservation or otherwise subject to that tribe's jurisdiction, and may provide that nonmembers of the tribe or non-Indians shall not be entitled to receive by devise or descent any interest or trust or restricted lands

within that tribe's reservation or otherwise subject to that tribe's jurisdiction: *Provided,* That in the event a tribe takes such action—

"(1) if an Indian dies intestate, the surviving non-Indian or nonmember spouse and/or children may elect to receive a life estate in as much of the trust or restricted lands as such person or persons would have been entitled to take in the absence of such restriction on eligibility for inheritance and the remainder shall vest in the absence of a qualified person taking a life estate;

"(2) if an intestate Indian descendent has no heir to whom interests in trust or restricted lands may pass, such interests shall escheat to the tribe, subject to any non-Indian or non-member spouse and/or children's rights as described in paragraph (1) of this section;

"(3) if an Indian decedent has devised interests in trust or restricted lands to persons who are ineligible for such an inheritance by reason of a tribal ordinance enacted pursuant to this section, the devise shall be voided only if, while the estate is pending before the Secretary for probate, the tribe acquires such interests by paying to the Secretary, on behalf of the devisees, the fair market value of such interests as determined by the Secretary as of the date of the decedent's death: *Provided,* That any non-Indian or nonmember spouse and/or children of such decedent who have been devised such interests may retain, at their option, a life estate in such interests.

Any ineligible devisee shall also have the right to renounce his or her devise in favor of a person or persons who are eligible to inherit.

"(b) The right to receive a life estate under the provisions of this section shall be limited to—

"(1) a spouse and/or children who, if they had been eligible, would have inherited an ownership interest of 10 per centum of more in the tract of land; or

"(2) a spouse and/or children who occupied the tract as a home at the time of the descedent's death.".

(4) Section 207 is amended to read as follows:

"SEC. 207. (a) No undivided interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is incapable of earning $100 in any one of the five years following the death of the decedent.

"(b) Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.

"(c) Notwithstanding the provisions of subsection (a), any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a), provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests."

(5) At the conclusion of the Act add the following new section:

"SEC. 212. Nothing in this Act shall be construed as vesting the governing body of an Indian tribe with any authority which is not authorized by the constitution and by-laws or other organizational document of such tribe."

SEC. 2. The Act of March 29, 1956 (c. 107, 70 Stat. 62; 25 U.S.C. 483a) is amended by inserting immediately after the enacting clause "(a)" and by adding at the conclusion of the Act a new subsection (b) as follows:

"(b) In the event such land is acquired by an Indian or an Indian tribe, such land shall not be removed from trust or restricted status except upon application to the Secretary under existing law."

APPENDIX I

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

Memorandum

To: All Area Directors
Attention: Realty Officers and Land Titles and Records Managers.

All Superintendents
Attention: Realty Officers

From: Deputy Assistant Secretary—Indian Affairs (Operations)

Subject: Interim Instructions in Implementing Sec. 207 of the Indian Land Consolidation Act of January 12, 1983.

On January 12, the Indian Land Consolidation Act (Title II of P.L. 97-459; 96 Stat. 2515) was signed into law. Sections 202 and 207 of this act read as follows:

SEC. 202. For the purpose of this title—

(1) "tribe" means any Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust;

(2) "Indian" means any person who is a member of a tribe or any person who is recognized as an Indian by the Secretary of the Interior.

(3) "Secretary" means the Secretary of the Interior; and

(4) "trust or restricted lands" means lands, title to which is held by the United States in trust for an Indian or an Indian tribe or lands title to which is held by Indians or an Indian tribe subject to a restriction by the United States against alienation.

* * * * *

SEC. 207. No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation of otherwise subjected to a tribe's jurisdiction shall descedent (sic) by intestacy or divise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

Section 207 effects a major change in testate and intestate heirship succession for certain undivided fractional interests in trust and restricted Indian land. Under this section, certain interests in land, as explained below, will no longer be capable of descending by intestate succession or being devised by will. Such property interests will, upon the death of the current owner, escheat to the tribe. It should be emphasized that no one currently owning property will be divested of that property.

Until regulations are promulgated, the following interim instructions relating to Section 207 will be in effect:

> "Tract" means a parcel of real property that is separately described for purposes of estate inventory.
>
> "Within a tribe's reservation or otherwise subjected to that tribe's jurisdiction" means within the exterior boundaries of a tribe's reservation as determined by the Secretary, plus any additional area over which a tribe has been determined by the United States to have civil jurisdiction.
>
> "Earned to its owner less than $100 in the preceding year before it is due to escheat" means that during the year immediately prior to the death of the decedent, $100 or more was *not* paid, or payable, to the decedent from his/her interest in a tract.

To assist Administrative Law Judges within the Office of Hearings and Appeals in the probating of trust and restricted estates of Indians dying after January 12, 1983

(the effective date of P.L. 97-459), the following data, in addition to that required by 43 CFR 4.210, must be furnished by the Superintendent:

> For each tract in which the decedent held an undivided fractional interest, the estate inventory must include the amount of that interest both in the standard fractional form and in decimal form rounded to the nearest seventh decimal place.
>
> For each tract (within a tribe's reservation or otherwise subjected to a tribe's civil jurisdiction) in which the decedent held an undivided interest of .0200000 or less, a statement of the amount of money earned from said interest which was paid or payable to the decedent during the one year period preceding his/her death. This amount must constitute only earned monetary compensation and will not include any increase in the value of the undivided interest resulting from appreciation and/or improvements. These tracts, ownership interests, etc., will be listed under a special heading on the estate inventory, or on a separate page of said inventory.

Because Section 207 of P.L. 97-459 constitutes a major change in Indian heirship succession, Area Offices and Agencies are urged to provide all Indian landowners under their jurisdiction with notice of its effects.

For any Indian dying after January 12, 1983, possessed of an undivided trust and/or restricted interest in a given tract of land, such interest will escheat to the tribe if (1) the tract is within an Indian reservation or within an area subject to the civil jurisdiction of an Indian tribe, (2) the decedent's undivided interest amounted to two percent (.0200000) or less of the total, and (3) the decedent's interest earned for him/her less than $100 in cash during the one-year period preceding death.

To assure the effectiveness of a will or heirship succession under state law, any Indian owner within the above category (if he or she is concerned that the tribe rather

than his or her heirs or devisees will take these interests) may purchase additional interests from coowners pursuant to 25 CFR 151.7 and thereby increase his/her ownership interest to more than two percent. Another alternative is for such an owner to convey his/her interest to coowners or relatives pursuant to 25 CFR 152.25 and reserve a life estate, thus retaining the benefits of the interest while assuring its continued individual, rather than tribal, ownership. A third alternative, if feasible, is to partition the tract in such a way as to enlarge the owner's interest in a portion of said tract.

Indians falling within the above category and who are presently occupying, or in any other way using, the tract in question should especially be advised of the aforementioned alternatives.

P.L. 97-459 augments and actually increases the need for accurate accountability and timely posting of trust and restricted title. All personnel within the Bureau of Indian Affairs who are responsible for these activities will maintain the highest standards possible in order to avoid the necessity for probate modifications. Such modifications, depending on the location of the tract in question, the size of the interest, and/or the earned income, could easily change the line of descent and, therefore, the ownership of that interest. Any long-standing ownership error, originating in wrongful reporting of any of the above factors, could make the Bureau of Indian Affairs liable to suit especially where income has been derived from the inherited interest and spent by the incorrect owner.

It is anticipated that the Office of Hearings and Appeals will soon be meeting to address the need for regulatory changes brought about by Section 207 of P.L. 97-459. Until such time, the above instructions will remain in effect. Please refer any questions to our Division of Real Estate Services.